IN THE

# Supreme Court of the United States

DEC 29 1966

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OCTOBER TERM, 1966

No. 900

GLADYS TOWLES ROOT,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit.**

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TO THE HONORABLE CHIEF JUSTICE EARL WARREN AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Gladys Towles Root and petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse a decision of that court which reversed the decision of the United States District Court for the Central District of California dismissing a 148 page indictment against the petitioner, an attorney, in which petitioner was charged with subornation of perjury and obstructing justice.

## JURISDICTION

Jurisdiction is conferred by Section 1254(3), Title 28, U.S. Codes, Rule 7(c), Federal Rules of Criminal Procedure, Section 3731, Title 18, U.S. Codes, and applicable decisions and rules of this Court.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved, all of which are set out in Appendix A, and made a part hereof, are: Fifth Amendment, United States Constitution; Sixth Amendment, United States Constitution; Title 18, Sections 1503, 1621, 1622, and 3731, U.S. Codes; Title 28, Section 1654, U.S. Codes; Rule 7(c), Federal Rules of Criminal Procedure.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is set forth in Appendix B, and made a part hereof.

The opinion of the Honorable Peirson M. Hall, Judge of the United States District Court for the Central District of California, is set forth in Appendix C, and made a part hereof.

## THE FACTS

Petitioner, Gladys Towles Root, is an attorney at law of many years standing in the practice of law in Los Angeles County. She represented John William Irwin, one of the co-defendants in the trial of three defendants charged with the kidnapping of Frank Sinatra, Jr., the

son of the well known actor and singer. The three defendants were John William Irwin, Joseph Clyde Amsler and Barry Worthington Keenan.

It was the theory of defense attorney Root in the Sinatra kidnapping trial that it had been prearranged for the purposes of gaining young Sinatra publicity to advance his efforts in a motion picture and acting career. Irwin, Amsler and Keenan were convicted of the kidnapping, except that Irwin, who was represented by Mrs. Root, was acquitted of the actual kidnapping. An appeal on behalf of Irwin and Amsler is now still pending and undecided in the United States Court of Appeals for the Ninth Circuit.

After the convictions of the three defendants, they were lodged in the Los Angeles County Jail and later to prison. Irwin and Amsler have appealed their convictions and their cases are now pending on appeal in the Ninth Circuit.

An indictment was filed against Gladys Towles Root and another attorney, George A. Forde, charging them with subornation of perjury and obstructing justice in putting forth the defense of publicity and hoax. The indictment was filed July 29, 1964. (C.T. 2) After a hearing, the indictment was dismissed on November 2, 1964. (C.T. 53) No appeal was taken from the dismissal of the first indictment and that judgment of dismissal became final.

Thereafter, a second indictment was filed which is 148 pages long and is the subject of a second motion to

dismiss on the ground that the indictment did not state an offense against the laws of the United States in that it did not comply with Rule 7(c), Federal Rules of Criminal Procedure in that it was too lengthy (it would take 2 hours and 18 minutes, at least to read the indictment to the jury), that it did not specify which false testimony "may or may not be scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the transcript of the evidence of the trial in case No. 33,087-CR". (C.T. 287)

The trial court found that the indictment fails to inform the defendants "of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants in case No. 33,087-CR, they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated." (C.T. 287-288)

The government appealed the case to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court. Petitioner filed a cross-appeal in the Circuit Court on the grounds that attorneys, as a class, are excluded from service on the grand jury which returned the indictment and women attorneys, particularly, are excluded as a class from service on the grand jury which returned the indictment. On motion of the government, the cross-appeal was dismissed. Nevertheless, during the course of the presentation of the case to the Circuit Court, petitioner urged

these points. Implicit in the reversal of the District Court's judgment and order is the holding of the Circuit Court against the petitioner on these grounds.

Also, petitioner contended in the Circuit Court that where an indictment was returned by the grand jury and a motion to dismiss was made and granted by the District Court and no appeal was taken from that order, it became res judicata as to any subsequent proceedings or indictment. This contention was also overruled.

It was further contended by petitioner that the cause was improperly appealed to the Court of Appeals for the Ninth Circuit; that a construction of the indictment under Rule 7(c), Federal Rules of Criminal Procedure, involved the construction and interpretation of a constitutional provision or statute and excludes the Court of Appeals from jurisdiction of such appeals. (*U. S. v. Hvass,* 355 US 570, 2 L.ed.2d 496)

Petitioner contended that the sole jurisdiction to appeal in the case was in the Supreme Court of the United States, pursuant to the provisions of Section 3731 of Title 18, U.S. Codes. This contention was also overruled.

## QUESTIONS PRESENTED

1. Whether an indictment which is 148 pages in length and weighs several pounds complies with the constitutional provision to inform an accused, the court and the jury of the nature and cause of an accusation or is so prolix, ambiguous and confusing as to be an unconstitutional construction of the constitutional requirement of the Sixth Amendment.

2. Whether an appeal in this case lies exclusively to the Supreme Court of the United States and whether, in view of this fact, the Circuit Court of Appeals lacks jurisdiction in the light of the provisions of Title 18, Section 3731, U.S. Codes..

3. Whether a construction of Rule 7(c), Federal Rules of Criminal Procedure, is a statute within the meaning of Title 18, Section 3731, U.S. Codes, requiring the matter to be appealed directly to the Supreme Court of the United States and whether Rules of Court are construed such statutes in the light of *U.S. v. Hvass,* 355 US 570, 2 L.ed.2d 496.

4. Whether a dismissal of a prior indictment in the U.S. District Court, which is not appealed, is res judicata as to a second and superseding indictment.

5. Whether Rule 7(c), Federal Rules of Criminal Procedure, which requires an indictment to be a "plain, concise and definite written statement of the essential facts constituting the offense charged" is violated by a prolix indictment of 148 pages, weighing several pounds, and requires its dismissal.

6. Whether an indictment charging subornation of perjury is fatally defective in failing specifically to point out in plain, simple language just what was false, what was known to the witness who testified to be false and whether the defendant knew that it was false at the time of the alleged subornation and at the time of the testimony.

7. Whether an indictment for subornation of perjury is fatally defective in failing to allege that the defendant

knew that the testimony which he influenced the suborned witness to give was false and that in giving such testimony the witness would wilfully and corruptly commit the crime of perjury.

8. Whether an indictment charging subornation of perjury and setting out that the matters were material must specify more than the conclusion that it is material and specify wherein the testimony was and is material so that the court, in the first instance, can determine whether a crime has been charged and whether the defendant can have the protection on appeal and other proceedings of showing the lack of materiality of the matters alleged to have been suborned testimony.

9. Whether petitioner can raise the point as to the systematic exclusion of lawyers from the grand jury which returned the indictment as a violation of her constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States. (*Ballard v. United States,* 329 U.S. 187, 91 L.ed. 181; *Zap v. United States,* 328 U.S. 624, 90 L.ed. 1477)

10. Whether petitioner can raise the point and have the court determine the invalidity of the indictment on the ground that women lawyers were excluded from the grand jury which returned the indictment. (*Ballard v. United States,* 329 U.S. 187, 91 L.ed. 181; *Zap v. United States,* 328 U.S. 624, 90 L.ed. 1477)

## REASONS FOR GRANTING THE WRIT

This Court should grant the writ, in its supervisory administration of justice, to determine whether an indictment of 148 pages violates the Sixth Amendment to the

Constitution of the United States and Rule 7(c), Federal Rules of Criminal Procedure.

Assuming that it takes at least one minute to read a page aloud, it would take 2 hours and 18 minutes to read this indictment to the jury, if allowed to stand. We submit that no juror would or could intelligently follow such a reading, nor does this kind of an indictment inform an accused of the nature and cause of the accusation (Sixth Amendment), nor does it comply with Rule 7(c), Federal Rules of Criminal Procedure, which requires an indictment to contain a "plain, concise and definite written statement of the essential facts constituting the offense charged."

This Court, and this Court alone, has jurisdiction of the construction and interpretation of Federal Rules of Criminal Procedure. (*United States v. Hvass,* 335 US 570, 2 L.ed.2d 496)

This Court should also decide whether the grand jury which returned this indictment was illegally constituted in that all lawyers, by a court rule of the Central District of California, are intentionally excluded from the grand jury. (See Appendix D.) This Court should also, in its administration of criminal justice, decide whether this question can be properly raised on a cross-appeal on behalf of the appellee or decided on the appeal itself without any cross-appeal. (*United States v. Meyer,* 266 F.2d 747, 756)

This Court should also decide whether the intentional and systematic exclusion of women lawyers from the grand jury which returned the indictment vitiates the indictment. (*Ballard v. United States,* 329 US 187, 91 L.ed. 181; *Thiel v. So. Pacific Co.,* 328 US 217, 90

L.ed. 1181, *Zap v. United States*, 328 US 624, 90 L.ed. 1477)

The trial court, in dismissing this indictment, said:

> "While the indictment is thus cast in five counts, it is apparent that the gravamen of the offenses charged is that the defendants induced Amsler and Irwin to testify falsely concerning maters which are described only by subject matter in Counts I, IV and V, which false testimony may, or may not, be found scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the Transcript of the evidence of the trial in Case No. 33,087-CR.
>
> "Since taking the Motions to Dismiss under submission, the Court has carefully and repeatedly examined the indictment and the authorities cited by the parties, as well as many others, and cannot conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated." (C.T. 287-288)

The indictment in this case violates the Sixth Amendment to the Constitution of the United States requiring

that a defendant be informed of the nature and cause of the accusation. That amendment has been the law and still is the law.

*U.S. v. Cruikshank*, 92 US 542, 23 L.ed. 588

*Russell v. U.S.*, 369 US 749, 8 L.ed.2d 240

The indictment in this case violates Rule 7(c), Federal Rules of Criminal Procedure.

Rule 7(c), Federal Rules of Criminal Procedure, provides:

> "Nature and contents. The indictment of the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged . . ."

Certainly it cannot be said that the indictment in this case is plain, concise and a definite written statement of the essential facts constituting the offense charged. By this language the rule meant to exclude nonessential facts under the rule of *inclusio unius est exclusio alterius.* The maxim means that it excludes from its effect all those matters not expressly mentioned; it means the inclusion of one thing is the exclusion of another.

*Burgin v. Forbes*, 169 S.W.2d 321, 325

Therefore, the rule intended to exclude all of the non-essential facts to the charge and in this case, the non-essential matters embracing the charge of perjury. The various counts, therefore, contain unessential matters, making for an indictment of 148 pages. Can such an indictment be said to be "concise"?

Concise statement of cause of action requires terseness of statement as distinguished from long and prolix history.

*Dallas RR & Terminal Co., v. Sutherland, Texas,* 27 S.W.2d 830, 832

In *Taylor v. Neal,* 157 N.E. 646, 260 Mass. 427, the complaint of 231 pages was held violative of that state's rule requiring a concise statement and demurrers thereto rightly sustained.

Under Rule 29 for Government of Courts of Civil Appeal the Texas court held that the words "concise statement of the case", concise means "stated in a few words".

*West Texas Utilities Co. v. Pennington, Texas,* 11 S.W.2d 583, 584

The words mean the elimination of a long and prolix statement with a multitude of impertinent allegations.

*McLaughlin v. Emery,* 44 Mo. 350, 354

*Chasson v. Marley,* 28 S.E.2d 223, 224, 223 N.Car. 738

The word concise is defined as "brief, short; containing a few words or the principal matters only".

*Curtiss v. Corbett,* (N.Y.) 25 Howe's Pra. 58, 62, 63

The indictment in this case is therefore violative of Rule 7, Federal Rules of Criminal Procedure in that it is not (1) concise and (2) not confined to the essential facts constituting the offense.

Government counsel in his oral argument in the District Court acknowledged that parts of the indictment contained matters which are true and said he could pinpoint,

if given time, the parts that he alleges are false. But he can do this only because of his familiarity with the case. It is not a plain, concise statement to one unfamiliar with the case.

In *U.S. v. Cruikshank,* 92 US 542, 575, 558, 23 L.ed. 588 the Supreme Court of the United States said:

> "In crimininal cases prosecuted under the laws of the United States the accused has the constitutional right 'to be informed of the nature and cause of the accusation'. Amendment VI. In U.S. v. Mills, 7 Pet. 142 this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged' and in U.S. v. Cook, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged'. It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, — it must descend to particulars.' (1 Arch. C.R. and P.L. 291). The object of the indictment is, first, to furnish the accused with such a description of the charge against him that it will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged so that it may decide whether they are sufficient in

law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charges against him and the court must be able to decide whether the property taken was such as was the subject of larceny."

See also:

*The Schooner Hoppet and Cargo v. U.S.*, 7 Cranch 389, 3 L.ed. 380

*Pettibone v. U.S.*, 148 US 197

*U.S. v. Standard Brewery*, 251 US 210

*Weare v. U.S.*, 1 F.2d 617

*U.S. v. Cook*, 17 Wall. 168, 174, 21 L.ed. 538

*Ledbetter v. U.S.*, 170 US 606,611, 42 L.ed. 1162

*Russell v. U.S.*, 369 US 749, 8 L.ed.2d 240

*U.S. v. Debrow*, 203 F.2d 699, 702

An example of an indictment specifically setting out what the proposed perjury was to be is contained in *U.S. v. Debrow*, 203 F.2d 699, 702, footnote 1.

See also:

*United States v. Cobert*, 227 F.Supp. 915, 48 Corpus Juris 879, Sec. 128

*United States v. Seymour*, 50 F.2d 930

*United States v. Laut*, 17 F.R.D. 31, at page 34

*United States v. Dennee*, Fed. Cas. No. 14,947

WHEREFORE, petitioner prays that this Honorable Court grant certiorari and affirm the judgment of the District Court and reverse the judgment of the Circuit Court and order the indictment dismissed.

Respectfully submitted,

MORRIS LAVINE

*Attorney for Petitioner*

# APPENDIX A

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

**Fifth Amendment, United States Constitution:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Sixth Amendment, United States Constitution:**

"In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; . . ."

**Title 18, Section 1503, U.S. Codes:**

"Influencing or injurying officer, juror or witness generally.

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States, or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer

who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

**Title 18, Section 1621, U.S. Codes:**

"Perjury generally.

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath

states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

**Title 18, Section 1622, U.S. Codes:**

"Subornation of perjury.

"Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both."

**Title 18, Section 3731, U.S. Codes:**

"Appeal by United States.

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalid-

ity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

**Rule 7(c), Federal Rules of Criminal Procedure:**

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . "

## APPENDIX B

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA, *Appellant-Cross Appellee,* vs. GLADYS TOWLES ROOT and GEORGE A. FORDE, *Appellees-Cross Appellants.* | No. 20,360 |

[August 26, 1966]

**On Appeal from the United States District Court for the Southern District of California Central Division**

Before: JERTBERG and DUNIWAY, Circuit Judges, and GOODWIN, District Judge.

GOODWIN, District Judge:

A trial, sometimes referred to as a "search for the truth", was held in United States District Court for the Southern District of California, Central Division, resulting in conviction of Joseph Clyde Amsler and John William Irwin for violation of several laws of the United States, one of which was 18 U.S.C. § 1201, which section forbids the interstate transportation of a kidnap victim. This trial started on February 10 and terminated on March 7 of 1964.

The appellees, Root and Forde, were attorneys for Irwin and Amsler and represented them at the trial.

The defendants, Amsler and Irwin, testified in their defense, and it is their testimony and the source of their story that has created the necessity for this decision.

Name familiarity was of some consequence in the trial of defendants Amsler and Irwin.

Frank Sinatra, Jr. was the name of the victim the defendants were accused of kidnapping and transporting interstate, and it was the contention of the defendants Amsler and Irwin that the victim was in fact no victim at all but a willing participant in a scheme that would increase the familiarity of the name by the publicity resulting from the pseudo kidnapping.

It is to be noted that no issue has been raised concerning the name and the distinction between the words "famous" and "notorious".

If the source of the defendants Amsler's and Irwin's story is the basis of the charges made by the Government against the appellees Root and Forde, what claimed conduct on their part was in violation of the laws of the United States?

The function of an indictment by a federal grand jury is to correlate claimed wrongful conduct of the accused with the prohibitions set forth by Congress in its enactment of the criminal laws of the United States.

To test the sufficiency of an indictment by the grand jury returned against appellees Root and Forde and the validity of the order of the District Court dismissing the indictment on motion of the appellees, from which order the United States appeals, the indictment will be dis-

sected and each essential part discussed to determine if it meets the following requirements:

(1) Does it contain the essential elements of the statute?

(2) Is the language clear or is it ambiguous, not readily understood, contradictory or confusing?

(3) Does it adequately advise the appellees of the nature of the crime with which they are charged so they may defend against it?

COUNT ONE
[18 U.S.C. § 371]

1. That on or about December 14, 1963, within the Southern District of California, Barry W. Keenan, Joseph Clyde Amsler and John William Irwin were arraigned before United States Commissioners on a complaint filed that date which charged Barry W. Keenan and Joseph Clyde Amsler, aided and abetted by John William Irwin, with the interstate transportation of a kidnap victim, Frank Sinatra, Jr., in violation of 18 U.S.C. §§ 2, 1201.

2. That on or about January 2, 1964, a Grand Jury of the United States of America, sworn in as the September 1963 Grand Jury in the United States District Court for the Southern District of California, returned a six-count indictment (33087-CD) charging Barry W. Keenan, Joseph Clyde Amsler and John William Irwin in each count as follows:

a. COUNT ONE: charged conspiracy: to transport kidnap victim, Frank Sinatra, Jr., in interstate commerce in violation of 18 U.S.C. §1201; to transmit interstate

ransom communications in violation of 18 U.S.C. §875(a); and to possess ransom money from an interstate kidnapping in violation of 18 U.S.C. §1202; all in violation of 18 U.S.C. §371.

b. COUNT TWO: charged the interstate transportation of kidnap victim, Frank Sinatra, Jr., and aiding and abetting said violation in violation of 18 U.S.C. §§2, 1201.

c. COUNTS THREE through FIVE, inclusive: charged separate transmissions in interstate commerce of ransom communications, and aiding and abetting said violation, in violation of 18 U.S.C. §§2, 875(a).

d. COUNT SIX: charged the possession of ransom money from the interstate kidnapping of Frank Sinatra, Jr., in violation of 18 U.S.C. §1202.

3. On January 6, 1964, Barry W. Keenan, Joseph Clyde Amsler and John William Irwin were arraigned on said indictment in the United States District Court for the Southern District of California.

4. Between January 6, 1964 and February 10, 1964, pretrial motions were made, heard and ruled upon, and Barry W. Keenan, Joseph Clyde Amsler and John William Irwin pleaded not guilty to each and every count in the indictment, all in the United States District Court for the Southern District of California.

5. On February 10, 1964, jury trial on the above-said indictment commenced, and on March 7, 1964, the said jury trial concluded; all in the United States District Court for the Southern District of California.

6. Beginning on or about December 15, 1963 and continuing to at least March 7, 1964, defendant GLADYS TOWLES ROOT, an attorney at law, represented John William Irwin in the above proceedings.

7. Beginning on or about December 15, 1963 and continuing to at least March 7, 1964, defendant GEORGE A. FORDE, an attorney at law, represented Joseph Clyde Amsler in the above proceedings.

8. Beginning on or about December 14, 1963 and continuing to on or about March 7, 1964, defendant GLADYS TOWLES ROOT, defendant GEORGE A. FORDE and unindicted co-conspirators Barry W. Keenan, Joseph Clyde Amsler and John William Irwin agreed, confederated and conspired together to defraud the United States and to commit offenses against the United States, to-wit:

a. To corruptly endeavor to influence, intimidate, and impede witnesses in the discharge of their duties as witnesses in the United States District Court for the Southern District of California in Case 33087-CD, in violation of 18 U.S.C. §1503;

b. To suborn perjury in the United States District Court for the Southern District of California in Case 33087-CD, in violation of 18 U.S.C. §1622;

c. To commit perjury in the United States District Court for the Southern District of California in Case 33087-CD, in violation of 18 U.S.C. §1621;

d. To corruptly influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice in the United States District

Court for the Southern District of California in Case 33087-CD, in violation of 18 U.S.C. §1503.

The primary object of said conspiracy was to obtain an acquittal by improper and unlawful means for the unindicted co-conspirators, Barry W. Keenan, Joseph Clyde Amsler and John William Irwin, in Case 33087-CD.

It was part of said conspiracy that unindicted co-conspirators, Joseph Clyde Amsler and John William Irwin, would take the witness stand and testify in their own behalf.

It was part of said conspiracy that unindicted co-conspirators, Joseph Clyde Amsler and John William Irwin, would be instructed to testify falsely and would testify falsely in the following material subjects:

a. That Frank Sinatra, Jr. knew beforehand that he was to be kidnapped;

b. That the kidnapping of Frank Sinatra, Jr. was planned by people "higher up" than Barry W. Keenan;

c. That the kidnapping of Frank Sinatra, Jr. was a publicity stunt and a hoax;

d. That there was a person named "Wes" or "West" who was involved in planning the kidnapping of Frank Sinatra, Jr.;

e. That they were to be caught by law enforcement personnel; and

f. That once they were caught they would conduct themselves as if they had really kidnapped Frank Sinatra, Jr. and not reveal that it was a hoax and publicity stunt.

It was further part of said conspiracy that they would convey and publish the false information that the charged crimes were arranged as a publicity stunt and hoax by and on behalf of Frank Sinatra, Jr.

The defendants and the unindicted co-conspirators are said to have committed numerous overt acts in furtherance of said conspiracy and to effect the objects thereof, in the Central Division of the Southern District of California. Some eighteen overt acts of appellees are alleged.

Title 18 U.S.C. §371 is commonly known as the conspiracy statute. It reads in part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

In expressing themselves, the grand jury, with some help from the United States Attorney, charged the appellees with a violation of the quoted portion of 18 U.S.C. §371, but did not reach the language of the statute until No. 8. All of the descriptive material that precedes the language of the statute may be subject to a motion to strike at the instance of the appellees but surplusage is not fatal. *Ford v. United States,* 273 U.S. 593, 602 (1927). Words that are employed in an indictment that are descriptive of that which is legally essential to the charge in the indictment cannot be stricken out as surplusage. *Butler v. United States,* 20 F. 2d 570. Obviously all

matters set forth in the indictment prior to paragraph 8 are descriptive. Whether or not it was essential to describe the proceedings to lay a foundation for the allegations that follow is not material. Paragraph 8 uses the language of the statute and if it ambiguous, it is a congressional ambiguity that has lasted since its enactment and withstood many and varied attacks. Having alleged a conspiracy, the indictment in subparagraph a. under paragraph 8 charges a violation by appellees of 18 U.S.C. §1503. The statutory language is in part:

> "Whoever corruptly . . . influences, obstructs or impedes or endeavors to influence, obstruct or impede the due administration of justice shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Subparagraph a. is identical to 18 U.S.C. §1503.

Paragraph 8 b. charges a violation of 18 U.S.C. §1622, which reads:

> "Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both."

It is obvious that the charge in subparagraph b. in the indictment follows the language of the statute. The same may be said for subparagraph c. which charges a violation of 18 U.S.C. §1621. This section provides:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose

> or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1958 c. 645, 62 Stat. 733; Oct. 3, 1964, Pub.L. 88-619, § 1, 78 Stat. 995."

The allegation complies with the requirement that it be concise and easily understood.

Subparagraph d. restates 18 U.S.C. §1503.

The indictment sets forth the alleged objective of the conspiracy and the manner in which it was to be attained.

If the story of the defendants that the "kidnap victim" was in fact "not a victim" was believed by a trial jury, no other conclusion could have been reached than that an acquittal would have resulted, and it cannot be seriously contended that an acquittal of an accused because of perjury is countenanced in the law.

A conspiracy indictment must allege an unlawful purpose. That is not enough; the indictment must go further, and in this instance it does. There are eighteen overt acts set forth, and in each instance, one or the other of the appellees is charged with making a telephone call to, or having a meeting with, some person or persons in the furtherance of the unlawful design.

Appellee Root attacked the sufficiency of this count of this indictment on the following grounds:

(1) That a similar indictment had been dismissed by the United States District Court, from which order no appeal was taken, and therefore, the previous order was *res judicata* as to this second and superseding document.

(2) That the count is prolix, ambiguous and confusing and therefore the accused, the court and the jury are not properly informed.

(3) That Rule 7 (c) of the Federal Rules of Criminal Procedure requiring "plain, concise and definite written statements of the essential facts constituting the offense charged" has been violated and requires its dismissal.

(4) That false testimony which was the object of the conspiracy must be set forth and that its materiality must be shown.

(5) That appellee Root is of the feminine gender as well as an attorney at law, and can have a determination of the invalidity of the indictment on the grounds that lawyers were systematically excluded from the grand jury that returned the indictment.

*A fortiori* women lawyers suffered the same fate.

The District Court, by memorandum opinion, gave point four as ground for granting appellee's motion to dismiss the indictment.

In its memorandum opinion, the court had this to say:

> "While the indictment is thus cast in five counts, it is apparent that the gravamen of the offenses charged is that the defendants induced Amsler and

> Irwin to testify falsely concerning matters which are described only by subject matter in Counts I, IV and V, which false testimony may, or may not, be scattered somewhere among the 745 questions and answers that are contained in Counts II and III or somewhere else in the 4500 pages of the Transcript of the evidence of the trial in Case No. 33087-CR."

It is apparent that the ruling as to Count One was predicated on the fact that it was incumbent upon the Government to set forth the claimed false testimony. In this conclusion, the District Court erred.

The answer to appellees' contention may be put in the hypothetical.

Assume that the conspirators discussed the corrupt proposal with the defendant witnesses who refused to entertain it by exercising their right to refuse to testify? If the lower court ruling were correct, in that event a charge of conspiracy to suborn perjury would be fatally defective because the object of the conspiracy had not been accomplished and could not be alleged.

Title 18 U.S.C. §371 does not require "mission accomplished", only "mission attempted". An overt act by the conspirators in an effort to accomplish the mission satisfies the requirement of the statute.

There is no merit in the contention that the order dismissing Count One of the indictment was an adjudication of a fact that precluded the filing of a superseding indictment, and the contention that it is *res judicata* is untenable.

The remaining contentions of appellee Root do not require discussion.

The appellee Forde's claim that the false testimony was not alleged in Count One is identical with that of the appellee Root and has been answered.

Appellee Forde has injected a new element in oral argument not contained in his brief.

He urges that an attorney in counseling his client has latitude in aiding the client in the presentation of the client's story at trial time.

Quaere: Does this attorney-client relationship permit the client to relate a story manufactured by the attorney as Count One of this indictment charges?

Answer: No.

Count Two is in the language of the statute.

COUNT TWO
[18 U.S.C. 1622]

1. The Grand Jury hereby realleges and incorporates by reference paragraphs one through seven of Count One.

2. Beginning on or about December 14, 1963, and continuing to on or about March 4, 1964, within the Central Division of the Southern District of California, defendants GLADYS TOWLES ROOT and GEORGE A. FORDE knowingly procured, induced, instigated and suborned Joseph Clyde Amsler to knowingly commit perjury, in that, on March 2 and 3, 1964, said Joseph Clyde Amsler, having duly taken an oath before a competent tribunal, namely, the United States District Court,

Southern District of California, in Case No. 33087-CD then pending before said Court, a case in which a law of the United States authorized an oath to be administered, that he would testify truly, did willfully and contrary to said oath testify to material matters which he did not believe to be true * * *.

The testimony of the defendant witness need not be recited.

It is enough to say that it is elicited by the questioning of the appellees Forde and Root.

The indictment contains a number of separate references to the testimony contained in the reporter's transcript.

What the defendant witness could have said in a paragraph or two is embellished and it is assumed that the manner of relating the story had a two-fold purpose; to hold the listener's interest and to be convincing.

It is prolix as is contended by appellee Root.

It purports to be a documentary of the facts. The time, the place, the people present — all are necessary to the theme. In each instance and at the conclusion of that portion of the witness' answers set forth by the indictment, it is charged that the events related were not a documentary but a novel.

Ambiguity is ascribed to the manner in which the indictment attacks the character of the testimony, ambiguity to the extent that the appellees are not informed of the exact language used by the defendant witness when uttering the claimed perjury. To answer this contention, the charge is quoted:

"And said testimony was false and contrary to the oath taken by Joseph Clyde Amsler as Amsler, defendant ROOT and defendant FORDE then and there well knew and believed in that: At said time and place, mid-October, 1963, at Castellammare, Los Angeles, California, Barry W. Keenan did not tell Joseph Clyde Amsler that the person that was to be the victim [Frank Sinatra, Jr.] of this 'operation' was to know of it beforehand; nor was there any conversation that Keenan would tell Amsler something that Keenan shouldn't tell Amsler and that Amsler was not to repeat it (namely, that the 'victim of the operation was to know about it beforehand'); nor was there any conversation that 'Frank Sinatra, Jr., was — had already known — does already know that this (the kidnapping) was supposed to take place' nor was there any reference to 'higher-ups'; nor was there any conversation about Amsler 'and everybody he (Keenan) had in it with him' were to 'think of it as a legitimate crime'; nor was there any conversation about not divulging that they 'knew anything about who was behind it.' And the abovesaid testimony was material to the issues of guilt or innocence as framed by the indictment and the pleas of not guilty entered by all the defendants in Case No. 33087-CD."

Does Count Two offend Section (c) of Rule 7 of the Rules of Criminal Procedure? The first sentence of Rule 7 (c) provides:

"(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts consti-

tuting the offense charged. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

The language of the indictment is readily understood without the use of Webster.

If it is definite, where does the ambiguity lie? A careful search for contradictory statements is not revealing.

It is prolix, but the fact that the claim is extensive because the recitations of the witness are extensive does not offend the rule. If a witness is believed to have testified falsely in one hundred particulars, is there any valid reason why the charge in the indictment should be limited to a fewer number?

If the grand jury finds probable cause, it is not only its right but its duty to include all instances in the indictment in which it believes the offender may have transgressed. The court erred in dismissing Count Two.

Count Three differs from Count Two in only one respect. Appellees are charged with suborning the defendant witness Irwin to commit perjury.

Appellees are critical of Counts Four and Five claiming that the exact language of the defendant witness must be alleged rather than the conclusion derived by the pleader that the defendant witness claimed prior knowledge by the victim of the abduction. Counts Four and Five allege:

COUNT FOUR
[18 U.S.C. §1503]

1. The Grand Jury hereby realleges and incorporates by reference paragraphs one through seven of Count One.

2. Beginning on or about December 14, 1963 and continuing to on or about March 7, 1964 in Los Angeles County, California, within the Central Division of the Southern District of California, defendants GLADYS TOWLES ROOT and GEORGE A. FORDE unlawfully, willfully, and knowingly, did corruptly endeavor to influence, intimidate, and impede a witness, Joseph Clyde Amsler, in Case 33087-CD by inducing, commanding, requesting and having the said Joseph Clyde Amsler knowingly testify falsely and contrary to his oath as a witness on the following material subjects:

a. That Frank Sinatra, Jr. knew beforehand that he was to be kidnapped.

b. That the kidnapping of Frank Sinatra, Jr. was planned by people "higher up" than Barry W. Keenan.

c. That the kidnapping of Frank Sinatra, Jr. was a publicity stunt and a hoax.

d. That there was a person named "Wes" or "West" who was involved in planning the kidnapping of Frank Sinatra, Jr.

e. That they were to be caught by law enforcement personnel.

f. That once they were caught they would conduct themselves as if they had really kidnapped Frank Sinatra, Jr. and not reveal that it was a hoax and publicity stunt.

## COUNT FIVE
## [18 U.S.C. §1503]

1. The Grand Jury hereby realleges and incorporates by reference paragraphs one through seven of Count One.

2. Beginning on or about December 14, 1963 and continuing to on or about March 7, 1964 in Los Angeles County, California, within the Central Division of the Southern District of California, defendants GLADYS TOWLES ROOT and GEORGE A. FORDE unlawfully, willfully and knowingly, did corruptly endeavor to influence, intimidate, and impede a witness, John William Irwin, in Case 33087-CD by inducing, commanding, requesting and having the said John William Irwin knowingly testify falsely and contrary to his oath as a witness on the following material subjects:

a. That Frank Sinatra, Jr. knew beforehand that he was to be kidnapped.

b. That the kidnapping of Frank Sinatra, Jr. was planned by people "higher up" than Barry W. Keenan.

c. That the kidnapping of Frank Sinatra, Jr. was a publicity stunt and a hoax.

d. That there was a person named "Wes" or "West" who was involved in planning the kidnapping of Frank Sinatra, Jr.

e. That they were to be caught by law enforcement personnel.

f. That once they were caught they would conduct themselves as if they had really kidnapped Frank Sinatra, Jr. and not reveal that it was a hoax and publicity stunt.

It is sometimes difficult to define the difference between pleading a conclusion and the ultimate fact.

If a statement is made from which only one conclusion can reasonably follow and that conclusion is pleaded in the indictment, can it be said that the allegation is ambiguous or misleading?

In the testimony reported at trial time, the following occurred:

(Question by appellee Root)

"Q. What did he say in this regard purely as to principals?"

(Answer by defendant witness Amsler)

"A. He said that after I had coaxed him for awhile to try and find out more about the story, he said that Frank Sinatra, Jr. was—had already known—does already know that this was supposed to take place."[1]

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[1]Reporter's transcript in Case No. 33087-CD, page 3000, line 15, through page 3007, line 10.

(Questions by the prosecutor; answers by Amsler)

"Q. At that time when you left Barry Keenan after that trip in the mountain, did you leave with any sort of a feeling that there was somebody else behind Barry Keenan pulling the strings regarding these plans?

"A. Yes, sir.

"Q. You left with that feeling?

"A. Yes, sir.

"Q. What did you base that feeling on?

"A. He told me that—that Junior was supposed to know about it beforehand, and that he had mentioned that it was—it was all arranged like a syndicate thing. You know, a lot of people in it.

"Q. All right. Let's take it in sequence. Was this conference—what is said just before Mr. Keenan said, 'Junior is supposed to know about it beforehand'?

"A. I had been telling him that it was a crazy stunt and everything, and I didn't—I couldn't understand him going for a thing like this. And he said, 'Well, if things——' that I didn't know about it and he couldn't tell me. And I finally persuaded him to tell me that it was an inside job.

"Q. Was that the language Barry Keenan used? Did he say it was an inside job?

"A. I don't recall the exact language. I'm not even sure if—all I remember drawing from it is I

remember that he told me that Frank Sinatra, Jr. was to know about it beforehand and that——"[2]

Counts Four and Five allege the conclusion that Frank Sinatra, Jr. knew beforehand that he was to be kidnapped. What other conclusion can be drawn from the witness' testimony than that alleged by the indictment?

If appellee Root asked the question, she must have heard the answer.

The indictment could not be more specific. Its language is an adequate substitute for a halting, poorly constructed sentence that can have only one meaning.

The record is replete with questions and answers that fit this pattern and it is the better practice to use the clearer form. *United States v. Perlstein* (3 Cir. 1942), 126 F. 2d 789.

Reversed.

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[2]Reporter's transcript in Case No. 33087-CD, page 3231, line 6, through page 3232, line 24.

## APPENDIX C

## UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF CALIFORNIA
## CENTRAL DIVISION

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

GLADYS TOWLES ROOT, et al.,
*Defendants.*

No. 34,352-CR.

MEMORANDUM

The defendants are lawyers who represented Barry W. Keenan, Joseph Clyde Amsler and John William Irwin who were convicted of kidnapping one Frank Sinatra, Jr., in Case No. 33,087-Criminal, in this District and Division.

The trial in that case began February 10, 1964, and concluded on March 7, 1964. It is charged in the Indictment that the defendants herein represented the convicted kidnappers from on or about December 14, 1963 to the conclusion of that trial.

This is the second indictment against the defendants for alleged crimes arising out of, or in connection with, their representation of the defendants in that trial. The first was dismissed by the Court for failure to state an offense.

The present indictment is in five counts covering 148 pages.

The First Count is for conspiracy (1) to defraud the United States; (2) to corruptly obstruct, et cetera, witnesses, in violation of 18 U.S.C. 1503; (3) to suborn perjury in violation of 18 U.S.C. 1622; (4) to commit

perjury in violation of 18 U.S.C. 1621; and (5) to corruptly obstruct, et cetera, justice in violation of 18 U.S.C. 1503, all in said Case No. 33,087-CR. The Second Count is for alleged subornation of perjury of Defendant Joseph Clyde Amsler in said Case No. 33,087-CR., and is in XII paragraphs containing 509 questions and answers, and covers 69 pages; the Third Count is for alleged subornation of perjury of John William Irwin, covering 67 pages in XXI paragraphs with 236 questions and answers; and the Fourth and Fifth Counts charge obstruction of justice by having Joseph Clyde Amsler (Fourth Count) and John William Irwin (Fifth Count) testify falsely in the kidnapping trial, Case No. 33,087-CR.

While the indictment is thus cast in five counts, it is apparent that the gravamen of the offenses charged is that the defendants induced Amsler and Irwin to testify falsely concerning matters which are described only by subject matter in Counts I, IV and V, which false testimony may, or may not, be found scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the Transcript of the evidence of the trial in Case No. 33,087-CR.

Since taking the Motions to Dismiss under submission, the Court has carefully and repeatedly examined the indictment and the authorities cited by the parties, as well as many others, and cannot conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representa-

tion of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated.

It would serve no useful purpose to indulge in a prolonged dissertation of my views. It is sufficient to say that the Motions are granted on the grounds and for the reasons set forth in the Motion of Defendant Forde, and on the authorities cited by both defense counsel in their supporting briefs, and, as to the conspiracy count, on *Pettibone v. U.S.*, (1893) 148 U.S. 197, cited by the United States.

The Court specifically rejects grounds numbered 2, 3, 4 and 5 in the Motion of defendant Root to quash, filed on January 12, 1965, and in the Supplemental Motion to Dismiss filed on behalf of defendant Root on January 18, 1965.

Dated: Los Angeles, California, June 28, 1965.

/s/ PEIRSON M. HALL
United States District Judge

## APPENDIX D

### UNITED STATES DISTRICT COURT
### SOUTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| IN THE MATTER OF JURY SERVICE | ORDER EXCLUDING CERTAIN GROUPS. |

In addition to those persons exempt from jury service under Section 1862, the Court finds under Section 1863 of Title 28 of the United States Code, that jury service by members of the following classes or groups of persons would entail undue hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice; and based on such finding and for the public interest,

IT IS ORDERED that said classes or groups are excluded from the jury panel or excused from service as jurors, except that an individual member of any of said classes or groups who consents or does not object to service, may be placed on the jury panel if otherwise qualified:

1. Attorneys at law;

2. Ministers of the gospel, priests of any denomination following their profession, and members, lay or clerical, of religious orders;

3. Teachers or students in a university, college, academy, or school;

4. Practicing physicians, practicing surgeons, practicing licensed dentists, practicing chiropodists, practicing registered optometrists, and druggists actually engaged in the business of dispensing medicines;

5. Officials or employees of a public body such as Irrigation Districts, Public Utility Districts, and publicly operated businesses such as the Department of Water and Power of any city operating its own water or power system;

6. Women taking care of young children;

7. Persons residing more than 40 miles from the place of holding court.

Dated: November 8, 1957.

FOR THE COURT:

Filed: Nov. 8, 1957

LEON R. YANKWICH

*Chief United States District Judge*

# In the Supreme Court of the United States

OCTOBER TERM, 1966

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No. 900

GLADYS TOWLES ROOT, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner and her co-defendant, George A. Forde, are attorneys who represented John W. Irwin and Joseph C. Amsler at their trial on charges of kidnapping Frank Sinatra, Jr. In July 1964, a grand jury in the United States District Court for the Southern District of California returned an indictment charging petitioner and Forde with conspiring with Irwin and Amsler to obstruct justice and commit perjury in order to obtain an acquittal by conveying false information in and out of the courtroom that the alleged criminal acts were arranged as a publicity stunt by the victim. In addition, two substan-

tive counts charged petitioner and Forde with obstructing justice by inducing false testimony by Irwin and Amsler respectively. A motion by petitioner and Forde to dismiss the indictment was sustained by the district court on the ground that essential elements had not been charged. The district court indicated that a count charging defendants with obstruction of justice at the trial of Amsler and Irwin would not state an offense unless it set forth the false testimony verbatim, alleged that it was material, and explained its materiality to the charges against Amsler and Irwin.

On December 9, 1964, a second indictment was returned by another grand jury. This five-count indictment charged petitioner and Forde with conspiracy, suborning perjury in violation of 18 U.S.C. 1622 (two counts) and corruptly influencing witnesses in violation of 18 U.S.C. 1503 (two counts). The conspiracy count charged that the object of the conspiracy was to obtain the acquittal of Amsler and Irwin by unlawful means, and that as part of the conspiracy Amsler and Irwin would be instructed to testify falsely as to six specified material subjects (see Pet. App. 9-10). These subjects of false testimony were repeated in the obstruction-of-justice counts (4 and 5). The subornation-of-perjury counts (2 and 3) alleged that petitioner and Forde wilfully caused Amsler and Irwin to testify falsely as to such specified subjects—"material matters" which the witness "did not believe to be true"—and then set forth verbatim 134 pages of trial transcript, divided into 33 chapters. As to each matter, the indict-

ment charged: "And said testimony was false and contrary to the oath taken by John William Irwin (or Amsler), as Irwin (or Amsler), defendant Root and defendant Forde then and there well knew and believed in that * * *." A statement of the matter in its truthful form followed. At the end of each chapter was an averment that the testimony was "material to the guilt or innocence as framed by the indictment and the pleas of not guilty entered by all of the defendants in Case No. 33087-CD (Amsler's and Irwin's trial)."

On June 28, 1965, the district court once more sustained the defendants' motion to dismiss the indictment for failure to contain certain material averments—to wit, the precise testimony alleged to be false (Pet. App. C). On appeal by the government, the court of appeals reviewed each count and concluded contrary to the district court that the indictment was legally sufficient. It therefore reversed the decision of the district court. 366 F. 2d 377 (Pet. App. B).[1] Petitioner seeks review of the court of appeals' judgment.

There is, however, no occasion for further review of the indictment at this interlocutory stage. The

[1] The court of appeals had jurisdiction to entertain the government's appeal under 18 U.S.C. 3731 because the ground of the district court's ruling setting aside the indictment was deficient pleading, rather than any invalidity of the statutes upon which the various counts of the indictment were based. See *United States* v. *Borden Co.*, 308 U.S. 188.

The quashing (prior to trial) of the first indictment did not, of course, bar the returning of a second indictment which sought to cure the defects found in the first one. See *United States* v. *Oppenheimer*, 242 U.S. 85.

opinion of the court below demonstrates that each of the five counts of the indictment alleges the elements of the offense to be charged and fairly apprises the defendant of the crime intended to be alleged. *Hagner* v. *United States*, 285 U.S. 427; *United States* v. *Debrow*, 346 U.S. 374. The indictment is lengthy only because, in order to meet the prior objection by the district court, the government in the perjury counts set out verbatim more than 130 pages of the testimony alleged to be false and specified the nature of the perjury. The entire wording of the other counts —count one (conspiracy, including 18 overt acts), and counts four and five—occupies a total of seven pages. Petitioner could not be in doubt of the crimes with which she is charged.[2]

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
*Solicitor General.*

JANUARY 1967.

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[2] Petitioner attempts also to raise issues sought to be presented in her cross-appeal dismissed by the court below. The cross-appeal was properly dismissed because the government's appeal under 18 U.S.C. 3731 raised only the validity of the indictment as a pleading. Any other issues may be raised by petitioner on appeal from a final judgment. In any event, the exclusion of lawyers from jury duty by the district court is a valid exercise of its authority under 28 U.S.C. 1863, and the court's order excluding lawyers (Pet. App. D) properly declined to distinguish between male and female lawyers (*Ballard* v. *United States*, 329 U.S. 187).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 244198 560